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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 7

JOHN JOSEPH KILLIAN

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37–55) is reported at 275 F. 2d 561. The prior opinion of the court of appeals (Pet. App. 28–36) is reported at 246 F. 2d 77.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1960 (Pet. App. 56). A petition for rehearing was denied on April 13, 1960. On May 4, 1960, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 12, 1960. The petition was filed on June 11, 1960, and was granted on February 20, 1961, limited to questions 3 and 6 presented in the petition, 365 U.S. 810.

QUESTIONS PRESENTED

Questions 3 and 6 in the Petition (Pet. 3) are as follows:

3. Whether the instructions to the jury properly defined membership in and affiliation to the Communist Party.

6. Whether the production of statements which report payments to those witnesses, as informers, is excused after a complete foundation for their production under 18 U.S.C. Sec. 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in those statements.[1]

STATUTES INVOLVED

18 U.S.C. 1001, 29 U.S.C. 159(h), and 18 U.S.C. 3500 appear at Pet. App. 25–27. Section 5 of the Communist Control Act of 1954, 50 U.S.C. 844, appears in the brief of the *amici curiae* at pp. 28–29.

STATEMENT

Petitioner was charged, in a two-count indictment, with making a false statement in a non-Communist affidavit filed with the Regional Office of the National Labor Relations Board on December 11, 1952. At that time Section 9(h) of the Labor Management Relations Act, 29 U.S.C. 159(h),[2] pro-

[1] As the government sees this issue, the question before this Court is:

Whether the production of receipts and records of payments to witnesses who made reports to the F.B.I. is required under 18 U.S.C. 3500, when the government offers at the trial to produce complete lists of payments.

[2] This section was repealed by P.L. 86-257, 86th Cong., 1st Sess., Sec. 201(d), 73 Stat. 519, 525.

vided that the Board should make no investigation of a charge by a labor organization, or issue a complaint based on such a charge, unless each officer of the organization had on file with the Board an affidavit that he was not a member of, or affiliated with, the Communist Party. The statute makes the provisions of 18 U.S.C. 1001 (the False Statement Act) applicable to such affidavits. Count I charged that petitioner had sworn falsely that he was not a member of the Party in the affidavit and Count II charged that he had sworn falsely that he was not affiliated with the Party.

Petitioner's earlier conviction on the same charge was affirmed by the Court of Appeals for the Seventh Circuit. *United States* v. *Killian*, 246 F. 2d 77. On rehearing, however, that court reversed the conviction on the authority of *Jencks* v. *United States*, 353 U.S. 657. *United States* v. *Killian*, 246 F. 2d 77, 82. A second trial also resulted in a verdict of guilty on both counts, and petitioner was sentenced to five years' imprisonment on Count I and three years on Count II, the sentences to run concurrently. The Court of Appeals affirmed the conviction. *United States* v. *Killian*, 275 F. 2d 561 (C.A. 7).

The facts adduced at the second trial are as follows:

Petitioner was a member of the executive board of Local 1111, United Electrical, Radio and Machine Workers of America. A special meeting of the officers of the Local was held on December 9, 1952, for the purpose of having the officers execute non-

Communist affidavits (Tr. 104, 120).[3] As each officer came into the office, he was given a copy of the affidavit (NLRB Form 1081), and told to read and then sign it (Tr. 104, 116–117, 132).[4] As each officer signed his affidavit, it was notarized and placed in a stack with the affidavits which had previously been executed and notarized (Tr. 103, 118, 157). The completed affidavits were then placed in an envelope in the presence of, or under the direction of, the president of the Local and mailed to the National Labor Relations Board (Tr. 105, 119–120).

Upon receipt of the affidavits at the Chicago Regional Office of the National Labor Relations Board on December 11, 1952, the compliance officer checked them for completeness and to insure that each officer of the local union had executed an affidavit (Tr. 9, 12, 19–20, 25–26; Gov. Ex. 1–B, 1–U). Local 1111 was thereupon notified that it had compiled with the Act and could avail itself of the facilities provided by the Board (Tr. 18–19; Gov. Ex. 1–A).

The government's evidence as to petitioner's membership in the Communist Party covered the period from 1949 to 1953. Government witness Robert B. Fensholt testified that he became a member of the Communist Party while attending the University of Wisconsin (Tr. 159–161). He attended his first

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[3] "Tr." refers to the typewritten transcript filed with this Court.

[4] On the face of the form, just below the title, appears the following: "See Instructions on the reverse side" (Gov. Ex. 1–L). These instructions provide information as to who must file and the procedure to be followed.

Party meeting in October or November 1949 (Tr. 164), when he was introduced to fellow members in the Party cell to which he had been assigned (Tr. 165). Among those Party members was petitioner, whom Fensholt had known previously (Tr. 164–166). Fensholt, along with petitioner, was a member of the Student Branch of the Dane County Communist Party, a group composed of students on the University of Wisconsin campus in 1949–1950 (Tr. 166–167). Meetings were held three or four times a month and petitioner attended regularly; several meetings were held at petitioner's apartment (Tr. 166). Petitioner's assignments included working on behalf of the Party in the National Association for the Advancement of Colored People and in the National Lawyers Guild (Tr. 174–176). In short, Fensholt knew petitioner as a member of the Communist Party (Tr. 165).

Government witness Robert E. Sullivan testified that he joined the Communist Party in 1948 at the request of the Federal Bureau of Investigation (Tr. 368), and in late October 1949 he transferred his Party membership from Cincinnati, Ohio, to Madison, Wisconsin (Tr. 305, 306–307). After identifying himself, by secretive means, to Andrew Remes, Wisconsin State Chairman of the Communist Party, Sullivan was told that he would be contacted by someone in Madison (Tr. 306–307). In December 1949, Sullivan received a note requesting him to telephone petitioner, and upon his doing so a meeting with petitioner was arranged (Tr. 309). At this meeting, petitioner identified himself as the section or-

ganizer for the Party in Madison, and said that because of the need for security the section was being broken up into branches and eventually into smaller groups of 3 to 5 persons, each group having a particular assignment (Tr. 310–311). Petitioner described the assignments as the infiltration of various organizations and told Sullivan that he (petitioner) would let him know later to which group Sullivan would be assigned; but in the meantime petitioner assigned Sullivan to a campus group (Tr. 312–313). Sullivan attended Communist Party group meetings in 1949 and 1950 at which petitioner was a Party spokesman or leader (Tr. 316–325).

Sullivan testified that at a Communist Party meeting held in Madison in January 1950, at which petitioner was present, Remes stated that one could be a Party member without revealing his membership in an application for federal employment because the Party could "impose security measures on him" (Tr. 317–322). Also in January 1950, petitioner reassigned Sullivan and five or six of the older Party members to the downtown group (Tr. 326–327).

Sullivan also testified that he gave written reports to the F.B.I. with respect to the Party meetings he attended and other Party activities at the time or within a few days after they occurred (Tr. 327–328). At the close of Sullivan's direct testimony, petitioner moved for production, for use in cross-examination, of all statements given by Sullivan to the F.B.I. relating to the direct testimony (Tr. 330, 352). These statements were produced by the government to the court in camera to determine the portions related to

the witness's direct testimony (Tr. 331–332, 351). The court deleted the unrelated part and turned the rest of the statements over to petitioner (Tr. 342–360). The unexcised statements were preserved for the court of appeals (Tr. 360).

On cross-examination, Sullivan testified that he was paid by the F.B.I. for his services in cash beginning in 1946 at the rate of $25 plus $10 for expenses each month, including Party dues and payments for Party literature (Tr. 370, 373-374). The monthly amount was increased, including the $10 for expenses, in 1947 to $50; in 1948 to $75; in 1949 to $85; in 1950 to $110 (Tr. 371–372). Sullivan testified that, when he received the money from the F.B.I. for his expenses, he signed a receipt (Tr. 373). Sullivan's connection with the F.B.I. terminated in 1952 (Tr. 373).

After the completion of the cross-examination of Sullivan, petitioner again moved for production of all statements, without excisions, made by the witness to the F.B.I. (Tr. 398). The government opposed the motion on the ground that (1) there was no factual background to show the relation of these statements to the witness's direct testimony, and (2) the government had already produced all statements that related to the direct testimony of the witness (Tr. 399). Petitioner's motion was denied (Tr. 399). Petitioner then moved to strike the testimony of the witness, and this motion was also denied (Tr. 399–400).

Government witness Michael J. Ondrejka testified that he joined the Communist Party at the request of the Federal Bureau of Investigation in October 1949 and that he remained a member of the Party until November 1953 (Tr. 408–409). He stated that he knew petitioner to be a member of the Party from April 1951 to August 1953 (Tr. 413–414). Ondrejka was first introduced to petitioner in January and February 1951 at meetings of the Labor Youth League (Tr. 415), a Communist-front organization (Tr. 504). He next met petitioner in April 1951 at a meeting at the home of Jack Kling, who was the State Chairman of the Communist Party of Wisconsin (Tr. 416–417). Kling stated that the purpose of the meeting was to find out whether the persons attending were interested in attending "Communist Party Educationals," since "in order to become more effective Communists we must as Communists engage in the theoretical aspects of the Party as well as in other lines of work in the Communist Party" (Tr. 418). Petitioner said that he was interested in attending (Tr. 419). Petitioner gave a report on one of the educational classes at a meeting in June 1951 (Tr. 421). He stated that an upsurge of nationalism in the Far East had resulted in an effort to throw out the "capitalistic oppressers," but that this movement could only succeed under "the guidance and the leadership of the Communist Party" (Tr. 423).

In the middle of November 1951, Ondrejka testified, a closed Party meeting was held at petitioner's house (Tr. 424–425). Petitioner stated that the purpose of the meeting was to form a Party cell at the

Allen-Bradley plant. One of the purposes of the cell was to cultivate social contacts with the workers of the plant in order to recruit them into the Party (Tr. 425–426). Petitioner told Ondrejka that it was important that they both become stewards in the shop (Tr. 427). Subsequently, both did become stewards and attended stewards' meetings together (Tr. 428–429). In the fall of 1952, petitioner, while engaged in distributing political and union leaflets, would stop at Ondrejka's machine and discuss Party affairs (Tr. 430–431).

Ondrejka testified that a Communist Party meeting was held at petitioner's home in February 1953, which was attended by Jerry Rose and Ted Silverstein, the South Side Section Leader and Youth Coordinator, respectively, of the Communist Party in Milwaukee (Tr. 433–434). Rose said that the Party was pleased with the work that petitioner and Ondrejka had been doing for the Party in the Allen-Bradley plant during the previous several months (Tr. 435). He stated, however, that there was a need to coordinate the activity of petitioner and Ondrejka, each of whom had been operating in an individual fashion since they were then working on different shifts (Tr. 435). Rose stated that a new Allen-Bradley Party branch was to be formed to place them under tighter Party direction and guidance (Tr. 435). Rose suggested that petitioner be made chairman of the group because it would be easier for Rose to meet with petitioner (Tr. 435–436). Later in February 1953, petitioner attended a meeting with Ondrejka, Rose, and Silverstein to determine whether the Party should

establish a Labor Youth League group in the Allen-Bradley plant (Tr. 438–440). Petitioner proposed to form such a group, composed of himself, his wife, Ondrejka, and his wife, and at the same time to establish a "broader study group for the preparation of youth in the labor union" at the plant (Tr. 440). Petitioner said that he would introduce a resolution at the next stewards' meeting to establish a study group (Tr. 441). In March 1953, petitioner introduced a resolution at a stewards' meeting to start a labor school for young people in the union (Tr. 443–445).

Ondrejka also testified as to other Party meetings attended by petitioner as a Party member later in 1953. At a meeting in petitioner's home in April 1953, petitioner said that he and his wife pledged $35 to the Party and that, with the pledge of other members of their group, they had raised $80 of their goal of $100 for the annual Party fund drive (Tr. 447–448). Petitioner also discussed other Party business at the same time (Tr. 448–449). In June 1953, petitioner met with Ondrejka at petitioner's home to tell the latter the Party's orders as to strike action at the Allen-Bradley plant (Tr. 450–451). In August 1953, petitioner again met with Ondrejka at petitioner's home and read to Ondrejka the Party's new security regulations (Tr. 452–454).

At the conclusion of Ondrejka's direct testimony, petitioner moved for production of all statements furnished to the F.B.I. by the witness for use by the petitioner in cross-examination (Tr. 455). The court ordered production by the government to the court

in camera of "all statements that in any way affect the direct examination of the witness", so that the court could determine what parts should be deleted because they did not relate to Ondrejka's direct testimony, before the statements were turned over to petitioner (Tr. 459–460). All of the statements of the witness relating to his direct testimony, as excised, were turned over to petitioner (Tr. 464–491). Petitioner then renewed his motion for production of all statements relating to the testimony of the witness without excisions; this motion was denied (Tr. 491). The court also denied petitioner's motion to strike Ondrejka's testimony (Tr. 491).

On cross-examination, Ondrejka testified that he was employed by the F.B.I. from the spring of 1949 to April 1954 (Tr. 499). In the beginning the F.B.I. paid him $25 per month in cash for his services; this monthly payment was increased in November 1949 to $50 and continued at that rate until April 1954 when his connection with the F.B.I. terminated (Tr. 500–501). In addition, Ondrejka was reimbursed by the F.B.I. for expenses such as Communist Party contributions, dues, and travel (Tr. 503, 558), which he reported to an F.B.I. agent, who would write them down on a pad and reimburse him at a later date (Tr. 506). The court sustained an objection to the question whether Ondrejka signed receipts when he was reimbursed for his expenses (Tr. 506–509). Ondrejka estimated that the total paid him by the F.B.I. was $3,000 over the five-year period he was employed, or $600 a year (Tr. 559).

Ondrejka testified that he had furnished reports on petitioner's Communist Party activities to the F.B.I. (Tr. 535–536, 540), and that he had refreshed his recollection by reading about twenty of these statements the Sunday before testifying (Tr. 532–535, 562–563). Some reports to the F.B.I. were made orally to an agent, some in his own handwriting; he never saw the reports written by the agent prior to having his recollection refreshed the preceding Sunday (Tr. 542). One such report was shown to him by petitioner's counsel and he was cross-examined briefly with respect to its contents (Tr. 543–545).

At this point in the cross-examination, petitioner moved for production of all statements of the witness whether handwritten, typewritten, or the result of interviews with agents of the F.B.I. which related to the witness's testimony on cross-examination (Tr. 546–547). He also moved for production of the reports of expenditures for which he received reimbursement from the F.B.I. and the receipts he signed evidencing payment of those expenditures (Tr. 547–548). The government opposed production of documents that did not relate to the direct testimony of the witness. The government objected to the production of Ondrejka's reports of his expenditures and to the production of the receipts on the ground that they were administrative records of the F.B.I. and were immaterial and irrelevant; however, the government offered to produce a schedule of such payments indicating whether they were for services or for expenses (Tr. 551). The court sustained the government's objection and denied petitioner's motion

(Tr. 552–553). The court also denied petitioner's motion to strike all of Ondrejka's testimony on direct and cross-examination (Tr. 554).

Petitioner objected to the instructions to the jury on numerous grounds (see Tr. 713). In particular, he objected to the trial court's definitions of "membership" and "affiliation." The relevant instructions are set forth in the Appendix, *infra*, pp. 61–66.

SUMMARY OF ARGUMENT

I

The receipts signed by the government witnesses were statements within the meaning of 18 U.S.C. 3500 and were not immune from production merely because they are administrative records of the F.B.I. In our view, however, the case should be remanded to the district court to consider whether the receipts were sufficiently related to the witnesses' direct testimony to be producible and, if so, whether this error requires a new trial.

A. The issue concerning the production of the receipts should not be decided by this Court at this time. The case was decided both by the district court and the court of appeals on the basis of factual assumptions which are erroneous. First, petitioner moved for the production of reports made by witness Ondrejka to the F.B.I. concerning his expenses as an informer in the Communist Party. The government failed to tell either the district court or the court of appeals that no such reports existed at the time of trial—the personal notes of the F.B.I. agents who heard the oral reports had been destroyed, in ordinary course, long before the first trial.

Second, and more important, the prosecution indicated to the trial court, and the government argued in the court of appeals, that the receipts signed by Ondrejka did not itemize the nature of his expenses. Thus, the court of appeals (and apparently the district court) decided the issue on the basis that the schedules of amounts and dates of payments to Ondrejka, which the government offered to give petitioner, contained all the information in the receipts. In actual fact, nine of the receipts signed by Ondrejka were itemized and therefore provided some additional information not in the schedule. Since the lower courts did not have the opportunity to consider the case in this posture, we think that it is appropriate for the Court to remand the case for their initial consideration of the itemized receipts.

The government will contend that petitioner's conviction should not be set aside for a new trial, even on the basis of the true facts, because the receipts signed by the two government witnesses were not "related to" their direct testimony as required by 18 U.S.C. 3500 and that, even if they were related, the government's failure to produce constituted harmless error.

These issues are not ripe for determination by this Court. Neither the receipts nor the schedules are in the record or before this Court; yet proper resolution of the questions depends upon detailed examination of these documents. Moreover, the government's contentions involve detailed examination and comparison of the record, the numerous narrative statements of the

two witnesses which were produced, the receipts, and the schedules of payments. This is normally the responsibility of the lower courts, and not of this Court in the first instance.

B. While the case should be remanded to the district court for consideration of petitioner's contentions, this Court should not itself order a new trial. For the government will present in the district court substantial grounds for concluding, after examination of the record and documents, that petitioner is not entitled to a new trial, but that the judgment of conviction should be reinstated.

II

The trial court's instructions to the jury on membership and affiliation were correct.

A. In *Jencks* v. *United States*, 353 U.S. 657, 679, Mr. Justice Burton, in his concurring opinion, found the trial court's charge on the definition of "membership" in a case likewise brought under Section 9(h) of the Taft-Hartley Act to be deficient for failing to emphasize a crucial subjective fact: "the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member." This element was included in the court's charge in this case, and similar instructions on the definition of membership have been approved by several courts of appeals. *Fisher* v. *United States*, 231 F. 2d 99, 107 (C.A. 9); *Lohman* v. *United States*, 251 F. 2d 951, 954, 266 F. 2d 3 (C.A. 6), certiorari denied, 361 U.S. 923; *Travis* v. *United States*, 269 F. 2d 928,

942–943 (C.A. 10), reversed on other grounds, 364 U.S. 631. This subjective element of mutual acceptance by the member and the organization is the ultimate question for the jury.

2. Although the ultimate determination, contrary to petitioner's contention, is a subjective one, it is proved by objective facts, and therefore the jury should be instructed as to what objective facts evidence membership. The court here properly instructed that the state of mind required for membership can be determined by what an individual says and does. The court further told the jury that it should consider as objective circumstances relevant to membership twelve criteria, such as payment of dues, attendance at Party meetings, subjection to Party discipline, and so forth. These were substantially the criteria set forth in Section 5 of the Communist Control Act of 1954 (50 U.S.C. 844) for determining Communist Party membership. While Section 5 probably does not apply by force of law to Section 9(h) of the Taft-Hartley Act, the criteria of membership thus enunciated by Congress are clearly relevant to a jury's determination of membership in a particular case. Similar criteria in Section 9(h) cases have been repeatedly approved by courts of appeals.

3. The contention that use of the indicia in Section 5 violates due process and allows conviction on the basis of activities protected by the First Amendment is plainly without merit. Section 5 creates no presumptions, and there is a rational connection between the specific criteria and the determination of

membership. And even though some activities which are relevant to proof of membership are perfectly legal in and of themselves, the First Amendment does not preclude their use in evidence for that purpose.

B. If petitioner's conviction is ultimately upheld on the "membership" count of the indictment, there would be no need to consider the instructions on the "affiliation" count, since the prison sentences were made to run concurrently. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105.

In any event, the court's charge on this point was clearly proper. The jury was told that "affiliated" means "a relationship short of and less than membership" but "more than that of mere sympathy for the aims and objectives" of the Party; and that a person may be found to be affiliated "when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis." This instruction accords with that suggested by Mr. Justice Burton in *Jencks*, 353 U.S. at 679–680, and with this Court's opinion in *Bridges* v. *Wixon*, 326 U.S. 135, as well as with decisions of several courts of appeals. Petitioner's challenges to the charge so widely accepted are unsound.

1. Petitioner claims that "affiliated with" the Communist Party means only membership in an organization affiliated with the Party. Section 9(h), however, requires union officers to swear that they are not "affiliated with such party," *i.e.*, the Communist Party. Thus, the statute itself strongly indicates that the oath is violated by an officer who was affiliated with the Party *either* because he was a member of an organization which itself was affiliated with the Party or because he himself was directly affiliated with the Party. The various opinions in *American Communications Assn.* v. *Douds*, 339 U.S. 382, which, in general terms, described Section 9(h) as applying to members of the Party and affiliated organizations (*id.* at 406, 421, 450), do not preclude this interpretation of the statute.

2. It is, of course, correct that "affiliation" in Section 9(h) does not necessarily have the same meaning as under the deportation laws and that therefore *Bridges* v. *Wixon* does not automatically apply here. On the other hand, the word is used in the two statutes in the same context, *i.e.*, affiliation with the Communist Party, and every court which has considered this issue has held that it has the same basic meaning.

Petitioner claims, however, that, if the definition in *Bridges* v. *Wixon* is applied, First Amendment problems are raised since this Court in *Douds* upheld the affiliation provision in Section 9(h) only because of the likelihood that members of the Communist Party would engage in political strikes, and a person could be affiliated with the Party by merely allying with the Party to achieve a socialist state without adopting its

methods. However, the decision in *Bridges* and the instructions here require proof that the Party could rely on its affiliate on a reasonably permanent basis and Congress was justified in concluding that a person who could be relied on by the Party on such a basis would probably use the political strike.

3. Petitioner claims that the instruction is inconsistent with this Court's requirement in *Bridges* that the affiliation must be of a quality "which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." But this part of the definition in *Bridges* clearly does not apply to cases under Section 9(h). The statute in *Bridges* related to deportability of aliens affiliated with organizations advocating overthrow of the government by force, whereas the purpose of Section 9(h) was to prevent members or affiliates of the Communist Party from using their position as labor leaders to interrupt interstate commerce by calling political strikes. It would make no difference that the intent of the union leader in using political strikes was to further only legal Party objectives, especially since the Party, in calling on the union leader who was its permanent ally, might well be using the strike for ultimately illegal purposes of its own.

4. While portions of the court's charge on affiliation were conflicting, petitioner was not prejudiced because there was no confusion which could have prejudiced petitioner. The net effect was to put a heavier burden of proof on the government than the law requires.

ARGUMENT

I

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION WHETHER THE GOVERNMENT'S FAILURE TO PRODUCE RECEIPTS GIVEN TO THE F.B.I. BY GOVERNMENT WITNESSES CONSTITUTED ERROR AND, IF SO, WHETHER THIS ERROR REQUIRES A NEW TRIAL

Two government witnesses, Sullivan and Ondrejka, who identified petitioner as a Party member, testified on direct examination that they themselves joined the Party at the request of the F.B.I. (Tr. 368, 408–409). On cross-examination, they testified that they were paid by the F.B.I. for their services and were also reimbursed for expenses incurred in connection with Party activity (see *supra*, pp. 7, 11). Sullivan testified that when he was paid for his services, he gave the F.B.I. agent a signed receipt (Tr. 373). Ondrejka testified that he reported his expenses to an F.B.I. agent who wrote them down (Tr. 506). The court sustained an objection to a question seeking to ascertain whether Ondrejka had signed receipts when he received reimbursement from the F.B.I. (Tr. 506–509). For this reason and because we know that Ondrejka in fact signed the receipts, we will consider this issue as if it had been established that receipts were signed by Ondrejka.

Petitioner moved on three occasions for the production of the entire content of all statements made by Sullivan to the F.B.I. (Tr. 330, 352, 398). The first two motions asked for statements relating to Sullivan's testimony and the last asked for all his statements without limitation. The court ordered the gov-

ernment to produce all the statements which were related to Sullivan's direct testimony (Tr. 332). The government stated that it had produced for the court's inspection in camera all of Sullivan's statements relating to his direct testimony, and the court gave these statements to petitioner except for the portions which it excised because they were not so related (Tr. 331–332, 351). Petitioner did not specifically request production of the receipts Sullivan signed for the payments made to him by the F.B.I.

Petitioner moved for the production of all statements made by Ondrejka to the F.B.I. without any exceptions (Tr. 455, 491). Again, the court ordered the government to produce all statements furnished the F.B.I. by Ondrejka which related to his direct testimony and deleted those portions of the statements which did not so relate (Tr. 459–460). Petitioner also moved for Ondrejka's reports to the F.B.I. of his expenditures for Party purposes and the receipts he signed when reimbursed for these payments (Tr. 547–548). The government objected to the latter motion on the grounds that the statements sought were too remote and unrelated to the issues, and were administrative documents, but offered to give petitioner a schedule of the payments made to Ondrejka for expenses and services (Tr. 550–551). Petitioner's counsel asked the Assistant United States Attorney whether the schedule contained "the items for which reimbursement was made" and was told, "I do not believe that they do, and it is my impression that neither do the receipts. I know that the schedule contains the dates of payments and the amounts * * *

from the beginning to the end. * * * And states whether or not the payments were for services or for expenses" (Tr. 551–552). When petitioner's counsel refused the tender of the schedule, the court denied the motion (Tr. 552).

Petitioner claims (Pet. Br. 8–11) that the trial court erred in refusing to order the production of reports of their expenses made by witnesses Sullivan and Ondrejka to the F.B.I. and the receipts which they signed and gave the F.B.I. when they were reimbursed for their expenses. This is the only issue respecting the production of documents which is before the Court; certiorari was denied as to the other production questions raised by petitioner. 365 U.S. 810.

A. THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT

We agree that the receipts signed by the witnesses were statements within the meaning of 18 U.S.C. 3500. While they contained extremely little information, they do, expressly or impliedly, state certain facts. Furthermore, there is no merit to the argument that the receipts signed by the witnesses were immune from an order requiring their production because they were administrative records of the F.B.I., which was one ground for the government's opposition to production in the district court. Their administrative character gave them no special immunity. The question remains, however, whether the assertions are sufficiently related to the subject matter of the witnesses' testimony and whether any portions should be excised. Also, where production has been refused, there is a potential question whether any error was harmless be-

cause the identical information had otherwise been supplied.

We submit that in the present case these issues concerning the production of receipts should not be decided at this time by this Court, but that the questions should be remanded to the district court for its consideration. One reason for this disposition is that the case was decided both by the district court and the court of appeals on factual assumptions which are actually erroneous. Those courts have never had the opportunity to consider the true issue in this case. Moreover, resolution of this issue requires detailed examination of both the record and the various statements made by the government witnesses, many of which are not now even in the record in any form—a responsibility which can be handled most appropriately, at least in the first instance, by the district court.

1. Petitioner's motion with regard to Ondrejka asked for the reports of his expenses made by Ondrejka to the F.B.I. This motion was based on Ondrejka's testimony that he had made such oral reports and an F.B.I. agent immediately wrote them down. Thus, the reports could come within the meaning of "statement" as defined by 18 U.S.C. 3500(e)(2)—"a stenographic * * * recording * * * which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." The Assistant United States Attorney responded to the motion by claiming that the reports and receipts were remote, and were ad-

ministrative documents, thus implying that such written reports existed. And the district court denied the motion on this basis.

In fact, we have been informed by the F.B.I. agents involved that no such written reports exist today nor did they exist at the time of either trial. The agents, we are told, merely made handwritten personal notes of the amounts spent by Ondrejka for expenses, which they transcribed to the receipts later signed by Ondrejka when he received reimbursement. The personal notes were destroyed immediately in the normal course of operation.[4]

We do not believe that the legal issue of production on which this Court has granted certiorari should be considered as if it actually involved documents which we now know do not and did not exist, and which therefore could not possibly have been produced. On the other hand, since Ondrejka testified that a written record was made of his oral reports, petitioner has the right not to accept the government's representations in this brief that the personal notes of the F.B.I. agent were destroyed long before trial and in the normal course of operations. He should have the opportunity, if he desires, to have either his counsel or the court question the responsible government officials if they are available. See *Campbell* v. *United States*, 365 U.S. 85. This procedure, of course, can be followed only in the district court.

2. More important, the prosecutor indicated in the district court that the receipts signed by Ondrejka—

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[4] It should be noted that these events occurred before *Jencks* v. *United States*, 353 U.S. 657, was decided by this Court.

which do exist—did not itemize the expenses for which Ondrejka was reimbursed. See *supra*, p. 11. The receipts were not shown to the district court at any time. Accordingly when the government offered to produce a schedule of the dates and amounts of payment, it appeared to the trial court that the schedule provided the identical information the receipts would provide if they were produced. It was apparently for this reason, at least in part, that the trial court denied petitioner's motion for production of the receipts.

In the court of appeals, the government's brief, citing the statement made by the Assistant United States Attorney to the trial court, said (p. 41, note 14) that "[t]he actual receipts do not contain a schedule of the purposes for which reimbursement was made but merely the total that was paid (Tr. 551)."* Consequently, the government argued (p. 41) that "[t]he schedule of payments would provide the defense with the information that he sought without requiring the Government to comply with the difficult, time-consuming, and wholly unnecessary task of producing a receipt for every payment made to the witness over a period of five years, which would not give the defendant any more information than the other method." The court of appeals adopted the government's representation concerning the content of the receipts, in stating that "the government has offered to supply the defendant * * * with a sched-

*The receipts were not before the court of appeals in any form.

ule of all information which the requested documents contained" (Pet. App. 52).

In actual fact, the statements made to the district court and in the government's brief in the court of appeals were inadvertently erroneous. A more detailed study of the receipts than was made during the brief colloquy at the trial would have revealed that nine of the receipts, beginning in 1950 and ending in 1953, apparently identified a few occasions or items of expense and the amounts.[1] Thus, certain of the receipts contained some additional information not provided in the schedule offered petitioner by the government. The district court and court of appeals never had the opportunity to consider the case in this posture and we therefore think that it is appropriate for the Court to remand the case for their redetermination of the issue of production of the receipts.

3. As we discuss below (pp. 27–36), the government's reasons for contending that petitioner's conviction should not be reversed for a new trial are (a) that the receipts given by Sullivan and Ondrejka to the F.B.I. were not "related to" their direct testimony as required by 18 U.S.C. 3500 and (b) that, even if they

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[1] For example, one receipt contains the following itemization covering the period from November 9, 1950, to Februar, 9, 1951:

Daily Worker & Sunday Worker	8.50
Foster Book	3.00
Bobrowicz meeting	5.00
LYL party	3.50
LYL party	3.00
Miscellaneous literature	2.00
	$25.00

were related, the government's failure to produce them would constitute harmless error. The former contention involves comparing the receipts signed by the witnesses with their lengthy direct testimony. The contention as to harmless error requires a comparison of the receipts with the narrative statements of the two witnesses which the government gave petitioner, as well as with the schedules of payment which the government offered to produce with regard to Ondrejka, and would have offered to produce with regard to Sullivan (see *infra*, p. 32) if petitioner had made a specific motion asking for the receipts. Such detailed examination and comparison of the evidence and various statements are normally the responsibility of the district court and the court of appeals. It is particularly inappropriate that this Court become involved in this task in this case since neither the receipts (which are 124 in number) nor the schedules of payments are part of the record or otherwise before the Court.

If the district court should determine, on remand, that there was no error in the refusal to produce the documents or that the error was not prejudicial, then it would reinstate the judgment of conviction; petitioner would, of course, have the right of appeal to the court of appeals and to petition this Court on certiorari. However, if the district court ruled otherwise, it would order a new trial.

B. THIS COURT SHOULD NOT ORDER A NEW TRIAL

In this section we summarize the contentions which the government will present in the district

court—that the government's failure to produce was correct since the receipts were not "related to" the witnesses' direct testimony and that, even if the ruling were erroneous, it was harmless error. We present these contentions—which we will urge upon the district court and which we believe will demonstrate that petitioner is not entitled to a new trial—not in an attempt to persuade this Court that the judgment below should be affirmed but to show that this Court should not order a new trial at this time because the government has a substantial case to present which merits the hearing suggested.

1. *The receipts signed by Sullivan.*—Sullivan testified on direct examination merely that he joined the Communist Party at the request of the F.B.I. Not until cross-examination did he indicate in any way that he was paid by the F.B.I. for his services or was reimbursed for expenses. Thus, we will argue before the district court that the receipts signed by Sullivan—which we will show, on remand, contained absolutely no itemization of the nature of the expenses (unlike some of Ondrejka's)—were not "related to" Sullivan's direct testimony.

Even if the receipts were "related to" Sullivan's direct testimony in some distant manner because they suggested his self-interest in testifying against petitioner, they were extremely remote. As the court of appeals said, "We do not believe the statute requires the court to explore every time-consuming, collateral alley which the court can devise in a particular case and which bears no direct relationship to the witness'

direct testimony" (Pet. App. 52). In our view, the court of appeals was correct that the trial court has considerable discretion in determining whether to order production of such remote statements, which do not deal with the subject matter of his direct testimony but bear only upon his bias or interest as a witness. Otherwise, trial courts would often be burdened with remote and useless statements—many of which would have to be examined in detail to determine what parts should be excised—because they related in this distant fashion to the witness's direct examination.[8] This is the same kind and degree of discretion that a trial court is allowed in controlling cross-examination for bias or interest.

We will contend before the district court that the trial court here had discretion to refuse production of these receipts. The receipts were part of an effort to impeach the witness by showing his monetary self-interest. The witness had already admitted that he was paid substantial sums for his services; the fact that he was reimbursed for his expenses, which he had also admitted, could not significantly change the witness's position. The trial court could certainly in these circumstances control further cross-examination

[8] For example, if a witness testifies on direct examination that he has been an F.B.I. agent or informant for ten years, every statement he has ever submitted to the F.B.I. relates in some distant fashion to his direct testimony since it shows he was an agent or informant at that time—and if there are no statements near the beginning or end of the ten years or substantial lapses in the middle this conceivably might be used to cross-examine the witness as to whether he actually served during the entire period.

on this collateral issue which did not directly involve petitioner's guilt or innocence and which had been fully covered. See *Glasser* v. *United States*, 315 U.S. 60, 83; *United States* v. *Clawans*, 300 U.S. 617; *Alford* v. *United States*, 282 U.S. 687, 694; *Storm* v. *United States*, 94 U.S. 76, 84–85; *United States* v. *Ball*, 163 U.S. 662.* By sustaining government objections to further questions seeking additional details of the payments (Tr. 506–509), the trial court indicated that the subject was sufficiently covered. Since cross-examination could have been and apparently was ended on the matter, we will contend that the trial court was not required by the statute to order production of statements concerning only this issue which was no longer to be developed. And, even if production was technically required by the statute, it could not help petitioner and was therefore harmless error.

In any event, we shall argue that petitioner failed with regard to Sullivan to make sufficiently clear to the trial court and the government that he was requesting the receipts as well as the narrative statements which are normally the subject of motions

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* In the *Ball* case, two material witnesses for the prosecution were asked on cross-examination whether they had at their own expense employed another attorney to assist the District Attorney in prosecuting the case. They frankly admitted doing so. This Court held that the ensuing question, "How much did you pay him?" might properly be excluded by the trial judge as immaterial. The case is thus support for the proposition that once a witness whose credibility is the subject of cross-examination admits a bias or prejudice or personal interest in favor of the prosecution or against the accused, the trial court may, in its discretion, preclude further questions on the subject.

made under 18 U.S.C. 3500. The only requests made by petitioner for the production of statements made by Sullivan to the F.B.I. called for the production of all such statements or at least all statements related to Sullivan's direct testimony. The government told the trial court that it would and did produce all of Sullivan's statements which related to his direct testimony, as 18 U.S.C. 3500 requires (Tr. 331–332, 351). Even though petitioner knew from Sullivan's testimony that Sullivan had given signed receipts to the F.B.I. when he was paid by the F.B.I. (Tr. 373), petitioner did not claim, unlike his position with respect to the receipts signed by Ondrejka, that these receipts came within 18 U.S.C. 3500.

In these circumstances, we will contend that petitioner cannot claim for the first time on appeal that the government should have produced the receipts. Petitioner knew at the time of trial that the receipts existed, that the government was purporting to produce all statements related to the direct testimony, and that nevertheless the government was not producing the receipts. In some situations, a defendant may not know the kinds of documents which the government may have but does not produce, and therefore cannot be required to specify those he wants produced. But this petitioner knew about the receipts and, in the circumstances of this case, it was his responsibility to ask specifically for them so as to notify the government that he was claiming that they should be produced along with the narrative statements.

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If petitioner had made a specific motion, we will show (on remand) that the government stood ready to submit a list of all the money, both for services and expenses, with the appropriate dates, paid by the F.B.I. to Sullivan. This list would have given petitioner all the information he could have obtained by production of the receipts, since, unlike the receipts signed by Ondrejka, none of Sullivan's receipts itemized his expenses. Thus, we will contend that even if petitioner had specified that he wanted production of the receipts—as was his responsibility—the government's failure to produce would clearly have been harmless error.

2. *The receipts signed by Ondrejka.*—a. Insofar as the receipts signed by Ondrejka do not itemize Ondrejka's expenses—and all but nine do not—the issue stands in virtually the same position as on Sullivan's receipts. We will argue on remand that they were entirely unrelated to Ondrejka's direct testimony and, even if they are considered to have some distant indirect connection, it was within the discretion of the trial court to refuse to order their production.

The only significant difference between the un-itemized receipts of Ondrejka and those of Sullivan is that petitioner made a specific motion for the production of Ondrejka's. This motion resulted in an offer by the government to produce a schedule giving the dates and amounts of payments made to Ondrejka not only for expenses but for his services. We will show on remand that this schedule, as the court of appeals held, would have provided petitioner with the identi-

cal information contained in the un-itemized receipts. Thus, even if the government should properly have produced these receipts, its failure to do so was harmless error.

b. The nine itemized receipts did state a small amount of information which was not contained in the schedule offered petitioner by the government (for an example of such a receipt, see *supra*, p. 25, note 7). They suggest that Ondrejka attended certain Party meetings and picnics, bought certain Party literature, and made certain contributions. Only two receipts contain even a remote reference to anything to which Ondrejka testified on direct examination. One receipt states Ondrejka's expenses as $3.50 and $3 for two L.Y.L. (Labor Youth League) parties sometime between November 9, 1950, and February 9, 1951. Ondrejka testified on direct examination that he first met petitioner at L.Y.L. meetings in January and February 1951 (Tr. 415). However, Ondrejka's detailed written reports to the F.B.I concerning these meetings were turned over to the defense at the conclusion of the direct examination. The brief notation in the receipt could not have conceivably provided petitioner any additional information. Thus, we will contend that the failure to produce this receipt showing these two meetings—the other notations on the receipt would properly have been excised as not related to Ondrejka's direct testimony—was, if error at all, harmless.

One other receipt in 1953 contains the notation "Party Fund Drive—$30.00." Ondrejka testified on

direct examination that at a meeting on April 17, 1953, petitioner reported that the quota for the Allen-Bradley branch of the Party for the Party's annual Fund drive was $100 of which $80 had been pledged as of that time, including $20 pledged by Ondrejka. Ondrejka's report to the F.B.I. concerning this meeting was furnished to the defense at the trial (stating the total pledged was $100, but giving no figures as to individual pledges), as were two other statements of Ondrejka describing petitioner's later efforts to have the members increase their financial support to the Fund drive. We will urge upon the district court that the extremely small amount of information contained in the receipt is of little, if any, significance, since it concerns the collateral issue of the witness's pay from the F.B.I. The important thing is that Ondrejka admitted that he was paid substantial amounts of money for his services and was also reimbursed for expenses. The lack of importance of this matter is shown by the fact that petitioner did not even make an attempt to use the narrative statements for cross-examination.

We will argue also that the other items on the receipts were not related to Ondrejka's direct testimony. He never mentioned the meetings, literature, or contributions suggested in these receipts. Conceivably, it could be said that Ondrejka's failure to testify that petitioner was at certain Communist Party or front meetings that Ondrejka attended could be used to cross-examine Ondrejka in order to show that petitioner did not attend some or even many meetings in the Milwaukee area that most other Party members attended and were expected to attend. Thus, possibly

an attempt could be made to develop the defense that petitioner merely attended occasional Party meetings—perhaps from curiosity, perhaps from ideologic sympathy, perhaps because union business was being discussed—and that he was never actually a Party member. We do not agree that this bare possibility should lead to production of the receipts, and intend so to argue on remand.

First, we will contend that the connection between Party meetings apparently attended by Ondrejka but not mentioned in his direct examination, on the one hand, and Ondrejka's actual direct testimony, on the other, is so distant that it is not properly "related to" his direct testimony under 18 U.S.C. 3500. *Lohman* v. *United States*, 266 F. 2d 3, 5 (C.A. 6), certiorari denied, 361 U.S. 923.[10] At the least, we believe that the relationship is sufficiently distant so that petitioner was required to indicate to the trial court that the itemized expenses were necessary to defense upon which he was going to rely. Here, petitioner never even suggested that his defense was that, while he attended a few Communist Party and front meetings, he did not attend many others. If this had been his theory, he would have argued that he was entitled to production of the particular narrative statements of Ondrejka, as well as Sullivan, describing other Communist meetings in and around Milwaukee. From the contents of and excisions from the narrative state-

[10] The fact that this same issue was before the court of appeals cannot be ascertained from that court's opinion. See, however, the record in No. 268, Oct. Term 1959, pp. 210–217, 288–289.

ments produced by the government, it was clear that the government and the trial court regarded descriptions of meetings not described by the witness on direct examination as unrelated to the direct testimony. (See, *e.g.*, Tr. 243–244). Certainly petitioner could readily surmise that some such descriptions existed in the reports since Ondrejka, for example, testified concerning only some ten meetings, and obviously had attended more than that number. Nevertheless, petitioner merely claimed that he was entitled to all of Sullivan's and Ondrejka's statements to the F.B.I. whether related to their testimony or not (an issue which is now foreclosed by the limitation of certiorari). Moreover, petitioner's counsel never asked questions on cross-examination concerning whether Sullivan or Ondrejka attended many other meetings from which petitioner was absent.

Second, even if we are wrong and the itemized receipts were related to Ondrejka's direct testimony under 18 U.S.C. 3500, we will contend below that the failure to produce these nine receipts is not ground for a new trial. Petitioner has never even indicated in the trial court, the court of appeals, or this Court how the existence of meetings attended by Ondrejka, but not mentioned in his direct testimony, would be used by the defense. Indeed, petitioner did not base his defense on any theory which could have used this information. Thus, the production of the itemized receipts could not have affected the outcome of the trial and the government's failure to produce them was harmless error, if error at all.

As we have just indicated, we will argue to the trial court (if a remand is ordered) that the failure to produce the receipts did not constitute prejudicial error, or error at all, and that a new trial should not be granted. We do not ask this Court to pass upon the merit of these arguments and affirm the conviction on the present record. While that record does not contain in any form either the receipts or the schedules of payments which the government offered to furnish (but which petitioner refused), their consideration is necessary to the disposition of the question on which the Court granted certiorari. Neither court below could give proper consideration to these documents because the government inadvertently misinformed both courts that Ondrejka's receipts (which neither court saw) were not itemized. This Court is not the appropriate forum to consider in the first instance the lengthy record and large number of documents involved, especially since it has before it neither the receipts nor the schedules. Accordingly, it seems more appropriate to remand the issue to the trial court which can determine, after consideration of the documents and argument, whether a new trial should be ordered or the judgment of conviction reinstated; in the latter event, the petitioner would, of course, have the right to appeal to the court of appeals.[11]

[11] As suggested above (pp. 23–24), a remand for a hearing is also appropriate in view of the information we have received that there do not exist (and did not exist at the time of the trials) any reports (other than the receipts) of Ondrejka's expenses and the payments made to him.

II

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY ON "MEMBERSHIP" AND "AFFILIATION" WERE CORRECT

If this Court, as we suggested above, remands the case to the district court for consideration of the issue concerning the production of reports and receipts of Sullivan's and Ondrejka's expenses, it would not be strictly necessary for the Court to pass at this time on the instructions to the jury. But we believe that it would be appropriate to do so. On the one hand, the trial court, on remand, may possibly decide that the failure to produce constituted error requiring a new trial. In that event, the court would presumably give the same or similar instructions, particularly since they have been approved by the court of appeals, and if petitioner were convicted, this issue would in all likelihood come to this Court again. If this Court disagreed with the instruction, a fourth trial would be necessary (two have already occurred). On the other hand, the trial court, on remand, may decide that no error occurred in connection with the demand for the receipts (or that any error was harmless) and reinstate the judgment of conviction. Petitioner would then have a right of further review. The court of appeals has already passed upon the instructions on "membership" and "affiliation," and this Court has indicated, by granting certiorari on this issue, that it is worthy of further review. Thus, if the conviction is sustained by the trial court on remand, review after the remand would be

shortened if the Court were now to decide this question. A third possibility is a ruling by this Court that error in the instructions required a new trial, which would moot the production issue and render superfluous the hearing on remand which we have suggested.

In these circumstances, the Court may well wish, since the issue is properly presented at this time, to consider the instructions and avoid the possibility of further, long delay.

Petitioner contends (Pet. Br. 11–32) that the trial court erroneously defined the meaning of "membership" in, and "affiliation" with, the Communist Party.[12] The instruction given, however, was obviously modeled on that suggested for cases arising under Section 9(h) by the concurring opinion of Mr. Justice Burton in *Jencks* v. *United States,* 353 U.S. 657, 678, 679.[13] We submit that this instruction correctly and clearly defined for the jury the elements of the offense charged.

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[12] These two instructions are set forth in full below at pp. 62–65 and 61–62, respectively.

[13] This opinion was joined by Mr. Justice Harlan and, as to this issue, by Mr. Justice Frankfurter (see 353 U.S. at 672). Mr. Justice Clark, in his dissenting opinion, stated that the instructions given in *Jencks* were sufficient (*id.* at 683–684); *a fortiori*, the more detailed instructions presented by Mr. Justice Burton were also sufficient. The majority opinion did not find it necessary to reach the issue of instructions (*id.* at 659, note 6) since it held that the case must be reversed because of the failure of the trial court to order the government to produce certain documents.

A. THE MEANING OF "MEMBERSHIP"

Petitioner contends that the trial court's instruction on membership was erroneous because (1) it defined membership in subjective terms as a state of mind rather than stating its overt objective components (Pet. Br. 12–16); (2) it failed to state precisely what objective circumstances should be considered in determining membership since the criteria of membership provided in Section 5 of the Communist Control Act, which the trial court substantially stated, are too indefinite to give the jury the necessary guidance; and (3) use of the indicia of membership in Section 5 was unconstitutional (Pet. Br. 16–21).

1. The trial court's definition of membership was almost verbatim the same instruction formulated by Mr. Justice Burton in *Jencks* v. *United States, supra.* The trial court in *Jencks* charged the jury (353 U.S. at 679):

> In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with membership in the Communist Party and all other evidence * * *.

Despite this specification of particular objective facts as evidencing Party membership, Mr. Justice Burton found the charge deficient because it failed

to require the jury to find a crucial subjective fact; it "failed to emphasize to the jury the essential element of membership in an organized group—the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member" (*ibid.*). In almost precisely the same language, the trial court in the instant case charged (Tr. 704; *infra*, p. 63):

> Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

Similar instructions have also been approved by several courts of appeals in cases arising under Section 9(h). In *Fisher* v. *United States*, 231 F. 2d 99, 107, the Ninth Circuit held that "[m]embership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization." In *Lohman* v. *United States*, 251 F. 2d 951, 954, the Sixth Circuit stated that "[m]embership should be so defined as to emphasize to the jury the necessity of finding that the appellant desired to belong to the Communist Party, and that the Communist Party recognized that it considered him as a member." On retrial this language was included in the trial court's instruction and the court

of appeals approved the instructions given. *Lohman* v. *United States*, 266 F. 2d 3 (C.A. 6), certiorari denied, 361 U.S. 923. In *Travis* v. *United States*, 269 F. 2d 928, 942–943, reversed on other grounds, 364 U.S. 631, the Tenth Circuit approved the identical instruction given in this case (quoted above) because it "emphasized the primary element of membership as suggested by Mr. Justice Burton in *Jencks* v. *United States* * * * and included the idea of the continuing reciprocal relationship necessary for that status." [14]

Thus, the courts have consistently held in cases decided under Section 9(h) that membership in the Communist Party is a mutually consensual relationship. This necessarily means, contrary to petitioner's contention, that the ultimate determination to be made by the jury concerns the state of mind of the alleged member and the attitude of the Party toward him.

2. Even though the ultimate determination is a subjective one, it is of course true that the jury can reach its conclusion only on the basis of the evidence submitted to it concerning objective facts. There-

[14] Petitioner relies heavily (Pet. Br. 12–13) on the statements in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 410–411, that "[i]n proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." The definitions of membership provided in Mr. Justice Burton's opinion in *Jencks* and in the Ninth Circuit's opinion in *Fisher*, which were followed in this case, state specifically what it means to join an organization generally and the Communist Party in particular. In other words, the act of joining is proven by the evidence of membership.

fore, it is essential that the jury be instructed as to what objective acts evidence membership. Otherwise, the jury would be left free to guess from the mass of evidence concerning the defendant's conduct whether he was a member.

The instructions to the jury fulfilled this requirement. First, the court correctly stated that the jury must base its determination on objective facts offered as evidence (Tr. 704–705, *infra*, pp. 63–64):

> Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

Then, the court told the jury that it should consider as objective circumstances relevant to membership twelve criteria—such as payment of dues, attendance at meetings, subjection to Party discipline, actions on behalf of the Party, and willingness to carry out Party plans (Tr. 705–706, infra, pp. 64–65)—which are substantially the criteria provided in Section 5 of the Communist Control Act of 1954 (50 U.S.C. 844)

for determining Communist Party membership. While Section 5 probably does not apply by force of law to Section 9(h) of the Taft-Hartley Act,[18] it does indicate what the Congress believes to be the components of membership in the Communist Party. Certainly, the trial court's instruction to the jury on this basis was not erroneous.

The same or similar criteria have been repeatedly approved by other courts for use in determining membership in the Communist Party. In *Jencks* v. *United States, supra,* the trial court instructed the jury to consider whether the defendant had attended Party meetings, held office, engaged in other conduct consistent only with membership, and all other evidence (quoted *supra,* p. 28). While Mr. Justice Burton found the instructions erroneous because they failed to emphasize the subjective element of membership, he did not disapprove of these criteria as properly bearing on the issue. In this case, the trial court likewise instructed the jury to consider whether

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[18] Apparently, Section 5 applies only to criminal prosecutions brought under Section 15(a)(2) of the Subversive Activities Control Act (50 U.S.C. 794) against individual members who fail to register in those limited situations where individual members are required to register personally. If, however, Section 5 does apply to prosecution under Section 9(h), the failure of the trial court to instruct the jury precisely in these terms is no ground for reversal. For the instructions were substantially the same as Section 5 and the major differences reflected lack of evidence concerning certain criteria making instructions on them unnecessary (see *infra,* p. 50, note 17). Moreover, petitioner did not object to the failure of the trial court to adhere more closely to Section 5, since his proposed instructions would have omitted use of the criteria in Section 5 altogether (Tr. 586, 606–608).

petitioner had attended Party meetings and other Party gatherings (criterion number 2), whether he had been accepted as an officer or member of the Party (criterion number 7), whether he had subjected himself to Party discipline (criterion number 3), and all other evidence.

Similarly, in *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953, the jury was told that it could consider in determining whether or not the defendant was a member of the Communist Party (see record filed with this Court, No. 764, Oct. Term 1954, p. 615a) whether he attended Party meetings (criterion number 2 in this case); whether he paid money to the Party (criterion number 1); whether he took instruction from Party leaders (criteria numbers 3 and 5); whether he took part in the distribution of Party literature (compare criteria numbers 4, 6, 9, and 12); and whether there was other evidence bearing on this issue. These instructions were approved by the court of appeals. 219 F. 2d at 249. In *Fisher* v. *United States, supra*, 231 F. 2d at 107, the Ninth Circuit stated that membership required proof of actions "such as paying dues, attending meetings and doing some of the work of the group." And then the court of appeals went on to state (*ibid.*):

> Congress in the Communist Control Act of 1954 indicates thirteen types of evidence which a jury may consider to determine the question of membership. * * * Analyzed carefully they break down into acts of the individual indicating a desire to belong, acts of

> acceptance by the organization, and various contributions of funds or services to the organization.
>
> • • • The jury should have been reminded of the components of the term membership rather than be supplied with synonyms.

The Tenth Circuit in *Travis* v. *United States*, 247 F. 2d 130, 135, approved the holding in *Fisher* that the trial court *must* define the components of membership by stating the criteria stated in Section 5. On retrial such instructions were given in virtually the precise language of the trial court in the instant case, and this use of the criteria of Section 5 was again specifically approved by the court of appeals. *Travis* v. *United States*, *supra*, 269 F. 2d at 942–943.

Petitioner suggests (Pet. Br. 19) that the statutory criteria as given to the jury would allow a finding of guilt on the basis of past membership alone, *i.e.*, prior to the date of the affidavit. But this contention fails to consider the evidence which was actually introduced in this case. The evidence showed that petitioner was introduced as a Party member at a meeting in the fall of 1949 and was active in the Party until the fall of 1952 or spring of 1953. On at least eight different occasions, the court admonished the jury to consider *all* the evidence—both pre-affidavit and post-affidavit—that was adduced at the trial (Tr. 673–674, 680, 683, 685, 704, 707, 708). Moreover, the court repeatedly emphasized to the jury the importance of either convicting or acquitting the petitioner on the basis of ascertaining his status with the Communist Party on the date he

executed his affidavit (Tr. 702, 703, 707). Thus, it is clear that the jury found that petitioner was a member of the Communist Party on the date of his affidavit on the basis of evidence concerning events immediately before and immediately after that date.

3. Petitioner and especially the *amici curiae* contend that use of the indicia in Section 5 is unconstitutional for two reasons: First, it violated due process by allowing the jury to base petitioner's conviction on evidence which has no rational relation to guilt (Pet. Br. 19; *Amici* Br. 16–21). And second, it violated the First Amendment by allowing the jury to base petitioner's conviction on statements and acts which are protected by the Amendment (Pet. Br. 7, 17–18, 20–21; *Amici* Br. 21–22). We submit that these contentions are plainly without merit.

As to the claim that use of the criteria in Section 5 violates due process, it is clear that both Section 5 and the instructions given in this case created no presumptions. Instead, they merely state that the jury can consider certain acts of the defendant,[16] as well as other evidence, as bearing on the issue of membership. The decisions of this Court in *Tot* v. *United States,* 319 U.S. 463, and *Morissette* v. *United States,* 342 U.S. 246, which are relied upon by the *amici* (*Amici* Br. 17, 20–21), are therefore not in point.

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[16] Section 5 states that "the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person * * *." The trial court here instructed the jury that "you may take into consideration whether the defendant * * *" (Tr. 705, *infra*, p. 64).

Moreover, there is obviously a rational connection between the various criteria stated in Section 5 and membership in the Communist Party. Payment of dues, attendance at meetings, subjection to the organization's discipline, execution of orders, etc., tend to show by common experience that a person is a member of an organization. Of course, if a person only went to a few meetings or occasionally participated in Party activities he might well not be a Party member. But this does not mean that the amount of such activity on behalf of the Party should not be considered by the jury. Indeed, it is difficult to understand how the government can prove a person is a Party member—particularly since the Party has generally attempted to conceal its membership—if evidence of this type cannot be introduced by the government and considered by the jury. And if it can properly be introduced and considered, it was proper for the trial court to instruct the jury to this effect.

It is of course true, as petitioner and the *amici* contend, that Section 5 allows a jury to determine that a person is a member of the Communist Party on the basis of acts and statements which are, in themselves, protected by the First Amendment. But this is hardly strange, since many of the activities of the Communist Party are legal. *American Communications Assn.* v. *Douds, supra,* makes it clear—in upholding Section 9(h) against a claim that it violated the First Amendment—that Section 9(h) does not make such acts or statements criminal, nor does it even prohibit membership in the Communist Party.

Section 9(h) prevents unions which select Party members as their officers from using the facilities of the National Labor Relations Board. It is Party membership which is critical, not the content of the officer's statements or acts. Furthermore, the crime of which petitioner was convicted is giving a false affidavit denying membership in the Communist Party—not the membership or acts and declarations. There is nothing extraordinary in using as evidence of a crime proof of acts and declarations which would be constitutionally privileged standing by themselves. Certainly, neither the First Amendment nor any other constitutional provision gave petitioner the privilege of making false affidavits. That is the only offense with which he is charged.

The *amici* brief also contends (*Amici* Br. 22–26) that, even if Section 5 is constitutional, its application to this case is nevertheless unconstitutional. Counsel reasons that the circumstances of this case required the trial court to give various additional instructions and either not give or modify certain of the instructions in Section 5. The short answer is that in the trial court petitioner asked for none of these relatively small changes. Instead, he objected to the definition of membership in its entirety and asked that his own instructions be given, which completely omitted the criteria of membership in Section 5 (Tr. 586, 606–608). Thus, the objections raised by the *amici* were not stated "distinctly" as required by Rule 30 of the Federal Rules of Criminal Procedure. While it is possible that the instructions suggested by the *amici* would, to some degree, be an improve-

ment—and therefore it may be proper for a trial court to give them in an appropriate case—the instructions given were sufficient. At the very least, the instructions were not so plainly erroneous that they may be reversed on appeal on the basis of an objection not adequately raised before the trial court.[17]

B. THE MEANING OF "AFFILIATION"

If petitioner's conviction is upheld on Count I, the membership count, there would normally be no need for this Court to consider whether the trial court's instruction to the jury on Count II, the affiliation count, was correct. Petitioner received a sentence of three years on Count II to be served concurrently with his five-year sentence on Count I. In these circumstances, it is well settled that ultimate affirmance of the conviction on Count I would require that the judgment of the court below be affirmed. *E.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642.

In any event, the trial court's instruction as to affiliation was both clear and correct. In *Jencks* v. *United States*, *supra*, the trial court merely quoted dictionary definitions employing synonyms and then

[17] The contention of the *amici* that the trial court "should make reference to a particular clause of Section 5 only if there is corresponding evidence of sufficient weight to support the inference of membership" (*Amici* Br. 25) has no relevance to this case. For here the trial court in fact omitted clauses (1), (9), and (10) of Section 5 apparently (as is, in fact, the case) because there was no evidence to support these criteria. On the other hand, there was clearly sufficient evidence for the consideration of the jury as to all the criteria on which the court did give instructions.

stated, "[a]ffiliation * * * means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both" (see 353 U.S. at 679). Mr. Justice Burton, in his concurring opinion, did not find that the instruction given was wrong insofar as it went, but that it omitted a crucial element—it "allowed the jury to convict petitioner on the basis of acts of intermittent cooperation. It did not require a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith' " (*id.* at 679–680). The trial court here gave not only the charge given in *Jencks* but also that prescribed by Mr. Justice Burton (Tr. 679, *infra*, p. 61):

> The verb "affiliated", as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.
>
> A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

Definitions of affiliation closely similar to that given by Mr. Justice Burton in *Jencks* and the trial court below have also been approved by several courts of

appeals in cases arising under Section 9(h). In *Fisher* v. *United States*, 231 F. 2d at 108, the Ninth Circuit held that "[t]he proper test to apply is whether one could be convicted under the instruction which was given who was only in sympathy with the aims of the Communist Party, and who occasionally would, say, distribute literature for it but without any obligation to do so or to continue to do so." In *Bryson* v. *United States*, 238 F. 2d 657, 664, the Ninth Circuit upheld instructions which are verbatim the same as those given in this case as "full and complete. They adequately informed the jury of the meaning of the term and provided an adequate standard for evaluating the evidence." The Sixth Circuit approved the definition of affiliation in Mr. Justice Burton's opinion in *Jencks*, in *Lohman* v. *United States*, *supra*, 251 F. 2d at 954. And an almost identical instruction to that given in this case was approved by the Tenth Circuit in *Travis* v. *United States*, *supra*, 247 F. 2d at 135, 269 F. 2d at 942.

The definition of affiliation stated by the trial court was also consistent with that provided by this Court in *Bridges* v. *Wixon*, 326 U.S. 135, and by the Second Circuit in *United States ex rel. Kettunen* v. *Reimer*, 79 F. 2d 315, both of which involved the issue whether an alien was deportable because he had been affiliated with the Communist Party. In the *Reimer* case, the court of appeals stated that affiliation was not proved (*id.* at 317):

> * * * unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist

> Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.

This definition was quoted and approved by Mr. Justice Douglas, speaking for the majority in the *Bridges* case. 326 U.S. at 142. And he went on to state that affiliation imports "less than membership but more than sympathy." *Id.* at 413.

Petitioner, however, contends (Pet. Br. 22–32) that the trial court's instruction to the jury on affiliation was erroneous because (1) it defined "affiliated with" the Communist Party to mean a direct relationship with the Party rather than membership in an organization affiliated with the Party (Pet. Br. 22–24); (2) the definition of affiliation laid down by this Court in *Bridges* v. *Wixon*, 326 U.S. 135, does not apply under Section 9(h) (Pet. Br. 24–30); (3) if the definition in *Bridges* v. *Wixon* does apply, the trial court's instructions were not consistent with it (Pet. Br. 30–31); and (4) the instructions were internally inconsistent (Pet. Br. 32).

1. Section 9(h) requires union officers to swear that they are not "affiliated with such party," *i.e.*, the Communist Party. Thus, the literal wording of the statute strongly indicates that the oath is violated if the officer is affiliated with the Party *either* because he is

a member of an organization which is affiliated with the Party or he himself is directly affiliated with the Party. Admittedly, in *American Communications Assn.* v. *Douds, supra*, the various opinions state that Section 9(h) applies to members of the Party and affiliated organizations (339 U.S. at 406, 421, 450) without indicating that it also applies to persons affiliated directly with the Party. But these statements were merely general descriptions of Section 9(h); they do not say whether the section also applies to persons affiliated with the Party itself since this issue was not before the Court. Moreover, Mr. Justice Burton in the *Jencks* case, as well as every court of appeals which has considered instructions concerning affiliation, construed Section 9(h) to apply to persons affiliated directly with the Communist Party. See the cases cited *supra*, pp. 50-51, for their approval of instructions similar to those given in this case.

2. It is, of course, correct that the meaning of "affiliation" in Section 9(h) does not necessarily have the same meaning as under the deportation laws and that therefore *Bridges* v. *Wixon, supra*, does not automatically apply to this case. On the other hand, in the absence of some indication in the language, the purpose of the statute, or its legislative history to the contrary, it is probable that the same words in the two statutes have the same meaning—particularly since they are used in the same context, *i.e.*, affiliation with the Communist Party. This is particularly true since Section 9(h) was enacted only two years after *Bridges* v. *Wixon* was decided by this Court.

Every court which has considered this issue has held that the definitions of "affiliation" in the *Bridges* and *Reimer* cases are applicable under Section 9(h). Mr. Justice Burton quoted with approval from *Reimer* and cited *Bridges* in his concurring opinion in *Jencks*, 353 U.S. at 679–680. These same two cases were quoted and cited with approval in *Fisher* v. *United States*, 231 F. 2d at 107–108. And the *Bridges* case was relied upon in *Lohman* v. *United States*, *supra*, 251 F. 2d at 954, and *Bryson* v. *United States*, 238 F. 2d at 664.

Petitioner claims (Pet. Br. 25–30) that, if the definition in *Bridges* v. *Wixon* is applied under Section 9(h), the result is to raise constitutional problems. First, petitioner says, the definition in *Bridges* may violate due process since it "is defined only in terms of the mental attitude of the individual involved, with no objective criteria of guilt * * *" (Pet. Br. 25). Just as with regard to membership, however (see *supra*, pp. 39–41), affiliation necessarily involves the subjective relationship of the organization and the person who is allegedly affiliated with it. But this subjective relationship can be determined by the jury only on the basis of objective evidence. Thus, the trial court expressly told the jury that "[w]hether or not the defendant was affiliated with the Communist party * * * is a question of fact which you are to determine from all the evidence in the case" and this determination should be based on the "statements made or acts done by the accused, and all other facts and circumstances in evidence * * *" (Tr. 679–680, *infra*, pp. 61–62).

Second, petitioner argues that the definition of "affiliation" in *Bridges* may, if applied under Section 9(h), violate the First Amendment (Pet. Br. 37). He reasons that in *American Communications Assn.* v. *Douds*, *supra*, this Court upheld the affiliation provision in Section 9(h) only because of the likelihood that members of the Communist Party would engage in political strikes; and that a person could be affiliated with the Communist Party by merely allying with the Party in order to achieve a socialist state without adopting its discipline or methods. However, the definition of affiliation in *Bridges* (as well as in the instructions in this case) requires proof that the Party can rely on its affiliate on a reasonably permanent basis. Congress could well conclude that a person who can be relied on by the Communist Party on a reasonably permanent basis will probably use the political strike, one of the Party's major weapons, and cooperate with the Party in such strikes. Certainly, the connection between a person upon whom the Party can directly rely and the political strike is, at the least, as close as the connection between a person who is a member of an organization which is affiliated with the Communist Party and the political strike. And this Court in *American Communications Assn.* v. *Douds*, expressly upheld the constitutionality of the affiliation provision of Section 9(h) insofar as it applies to members of organizations affiliated with the Party.

3. As we have shown above, the instruction given by the trial court as to affiliation is extremely close to that prescribed in *Bridges* v. *Wixon*. But peti-

tioner emphasizes (Pet. Br. 30) that in *Bridges* (326 U.S. at 143–144) this Court went on to say that "the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." This part of the definition of affiliation in *Bridges* v. *Wixon*, however, clearly does not apply to cases under Section 9(h). Thus, Mr. Justice Burton did not require an instruction as to the illegal objective of the alliance between the affiliate and the Communist Party in his definition of affiliation in *Jencks*.

Bridges v. *Wixon* involved a provision which made aliens deportable who are "affiliated with any organization * * * that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * * *." 326 U.S. at 138, note 1. Thus, the statute was expressly operative only in the event of proof of affiliation with an organization advocating illegal objectives, *i.e.*, forcible overthrow of the government. On the other hand, as this Court found in *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 387–389, the purpose of Section 9(h) was to prevent persons, whether members of or affiliated with the Communist Party, from becoming leaders of labor unions and using their position to interrupt interstate commerce by calling political strikes. Since political strikes interfere with interstate commerce whether their ultimate objective is lawful or not (and whether or not violence is a part of such a strike), Congress intended

to deprive unions of the use of facilities of the National Labor Relations Board whenever they were led by Party members or affiliates. It makes no difference that the intent of the union leaders was to further only lawful objectives of the Party (see *American Communications Assn.* v. *Douds, supra,* 339 U.S. at 393)—particularly since the Party, in calling on the union leader who was its permanent ally, might well be using the strike for illegal purposes even though the leaders' own intent was lawful. In short, Congress wanted to sterilize the Party's influence in the labor field, and it was irrelevant to that purpose whether the affiliated union leader agreed with or accepted the Party's illegal objectives. All that is involved under Section 9(h) is the close and intimate connection with the Party which "affiliation" connotes.

4. In the first paragraph of its instruction on affiliation, the trial court stated that affiliation "means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party" (Tr. 679, *infra,* p. 61). Two paragraphs later, the trial court charged that "affiliation * * * means a relationship which is equivalent or equal to that of membership in all but name" (Tr. 679, *infra,* p. 61). While these two instructions appear to be conflicting, they were more favorable to petitioner, taken together, than any instructions to which he was entitled. The instruction in the first paragraph, as we have shown above (pp. 50-53), correctly stated the law. The instruction in the third paragraph incor-

rectly put a heavier burden of proof on the government. If the jury was confused by the contradictory instructions, they presumably resolved the conflict by finding that petitioner was affiliated with the Communist Party under either definition. At the least, the jury could not have required a lesser standard of proof than that set forth in the first paragraph.

The basic weakness in petitioner's contention as to the instructions given by the trial court is that he seeks to require instructions as specific as mathematical formulas. Such self-defining clarity is neither required nor possible. Even if we assume that instructions on some other issue can achieve such high precision, "membership" and "affiliation" are relationships between two parties which by their very nature cannot be defined in absolute terms. All that can be expected is that the trial court set forth criteria which give the jury a reasonable statement of the ultimate issue—*i.e.*, whether petitioner was a member of or affiliated with the Communist Party on the date he executed his affidavit—and the various considerations which can properly be considered in reaching this determination. We submit that the instructions in this case, which are fully consistent with and were indeed based on all the judicial precedents under Section 9(h), more than adequately meet this test.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded to the district court for consideration whether the failure of the government to produce the reports and receipts of witnesses' expenses constituted error requiring a new trial. We also suggest that the Court pass at this time on the issue relating to the instructions to the jury, and submit that the Court should hold that the instructions, as given, were not erroneous.

Respectfully submitted,

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SEPTEMBER 1961.

APPENDIX

Instructions

Proposed Instruction No. 20 was tendered by the government and given by the court as follows (Tr. 679–680):

> The verb "affiliated", as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.
>
> A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.
>
> Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.
>
> Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.
>
> In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration

any statements made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issue.

Proposed Instruction No. 12 was tendered by the fendant and given by the court as follows (Tr. 701):

> Unless in addition to being convinced beyond a reasonable doubt that the defendant was a member of the communist party on December 11, 1952, you are also convinced beyond a reasonable doubt that he knew he was a member of the communist party on December 11, 1952 and signed and filed the affidavit and caused the affidavit to be filed on December 11, 1952, knowing that he was a member on December 11, 1952, you must find him not guilty under Count I of the indictment.

Proposed Instruction No. 13 was tendered by the defendant and given by the court as follows (Tr. 702):

> Unless in addition to being convinced beyond a reasonable doubt that the defendant was affiliated with the communist party on December 11, 1952, you are also convinced beyond a reasonable doubt that he knew he was affiliated with the communist party on December 11, 1952, and signed and filed the affidavit and caused the affidavit to be filed on December 11, 1952 knowing that he was affiliated with the communist party on December 11, 1952, you must find him not guilty under Count II of the indictment.

Proposed Instruction No. 19 was tendered by the government and given by the court as follows (Tr. 703–707):

> The crucial issue of fact in this case is whether on December 11, 1952, John Joseph Killian was or was not then a member of the Communist Party or affiliated with such Party.

The affidavit does not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavit would be entitled to sign the affidavit under oath without violating the law.

Since the affidavit speaks in the present tense only, the fundamental issue of fact for you to decide is whether or not at the time alleged in the indictment the defendant knowingly and willfully used an affidavit which was false and which he knew to be false at that time.

Whether or not the defendant was a member of the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into considera-

tion the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

4. Participated in any recruiting activities on behalf of the Communist Party;

5. Has executed orders, plans or directives of any kind of the Communist Party;

6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

9. Has spoken or in any other way communicated orders, directives or plans of the Communist Party;

10. Has advised, counseled, or in any other way imparted information, suggestions, or rec-

ommendations, to officers or members of the Communist Party or to anyone else, in behalf of the Communist Party;

11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

12. Has in any other way participated in the activities, planning or actions of the Communist Party;

These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment.

In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt that the defendant was a member of the Communist Party on December 11, 1952, as alleged in the indictment, and if you find, also, that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first count of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first count.

Proposed Instruction No. 22 was tendered by the government and given by the court as follows (Tr. 708):

Even if you are convinced beyond a reasonable doubt from the evidence that the defendant attended so-called "closed meetings" of the

communist party or of members of the communist party, such evidence standing alone does not prove that the defendant was a member of the communist party.

However, you are free to consider evidence of this fact along with all other evidence in this case in determining whether or not the defendant was a member of the communist party.

U.S. GOVERNMENT PRINTING OFFICE: 1961